Prepared Remarks of

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in the Knowledge-Based Economy

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I want to thank my good friend, Chairman Tim Muris, for inviting me to participate in these proceedings today, and to acknowledge both him and Assistant Attorney General Charles James for convening these important hearings.

The USPTO welcomes the FTC and the Department of Justice's desire to air a greater understanding of the patent system. Until recently, patent law was regarded as an esoteric field, understood and navigated by a relative few. It held, at best, a marginal place in law school curricula.

Today, both practitioners and law schools know differently, and the FTC and DOJ are to be applauded for helping to create a better understanding of intellectual property rights. In attempting to regulate certain economic relations, a greater appreciation of intellectual property will prevent against the unintentional consequence of stifling the very innovation and competition they seek to encourage.

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The USPTO is the Federal Government's tangible expression of commitment to invention and creativity. This commitment goes back to the first days of our republic. Our Founders recognized the importance of patents and copyrights in encouraging research and innovation. In drafting the framework for the United States, they placed into the Constitution in Article I, Section 8, the authority for Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

For over two centuries our Nation has remained deeply committed to that vision. The Founders understood that a property interest granted to inventors and creators, for a limited period, would create the incentive for innovation to propel us from a small, agrarian colony into an advanced and prosperous country.

The FTC and the Antitrust Division today undertake their missions in an economy in which intellectual property-based enterprises play a leading role.

During my service as an elected official, I saw that vision in action. With the decline of defense spending at the end of the Cold War, the economy of my home state of California came close to depression: some 700,000 jobs were lost with the exodus of defense-related jobs and the ensuing recession.

Yet in a few short years, California rebounded dramatically. All of those lost jobs were recovered -- and more. But they did not come from defense-based industries: they came from industries based on investment in intellectual property. Today, California continues to lead the nation toward a knowledge-based economy.

The understanding of the patent system begins with the recognition that patents are a form of property anticipated by the United States Constitution. The supposed tension between intellectual property law and antitrust law arises, I suspect, from a misunderstanding of patents as a form of monopoly. Although a patent allows an inventor to exclude others from using or selling the invention without permission, it is not a monopoly in the antitrust sense.

While patents can encourage risk-taking and investment in new ideas, patent law also limits the advantage that a patent confers. An inventor does not have exclusive rights to his invention forever. Once the term of the patent expires, the invention is in the public domain and may be used or manufactured by anyone. This term limit also creates incentives for patent holders not to rest on their laurels: they must continue to innovate, since the advantage of patent protection is temporary.

In granting an inventor a temporary patent, the public is given permanent and valuable consideration. In exchange for the limited grant, inventors must fully disclose their invention for all the world to see, study, replicate, and make improvements thereon. The patent must describe and disclose the invention so completely that it would allow someone of ordinary skill in the art to replicate the invention without difficulty.

This is a remarkable trade-off. It is analogous to asking a business to teach its competitors how to use the latest, most cutting-edge technology. This disclosure requirement is all the more stunning when one considers it also allows a competitor to see where the competition's research may take them in the future.

It is highly unlikely that businesses ordinarily would open such windows into their research and development without obtaining a valuable right in exchange. Under our patent system, that which might forever remain locked up as a trade secret is now open for inspection. In analyzing the economic effects of the patent system, commentators often ignore this *quid pro quo* that society obtains from inventors in exchange for the temporary patent grant.

The Patent Act also encourages the disclosure of secret information in another way. It creates an incentive for inventors and businesses to publish their new technologies early, even if they do not intend to patent them, since the printed publication of an invention can disqualify another who might independently arrive at the same discovery from obtaining exclusive patents rights for it in the United States. The FTC has previously noted the importance to competition of having policies that encourage disclosure of research. I trust these hearings will highlight the important role that the Patent Act obviously plays in advancing that policy.

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A patent is not simply a grant of economic advantage, nor is it a form of economic regulation. A patent must be earned through the satisfaction of objective criteria, as well as by appropriate disclosure of the innovation. When an inventor applies to the USPTO for a patent, the application is examined to ensure that under the Patent Act the claimed invention is new, useful and non-obvious when measured against all previous inventions.

Patent examination does not include an analysis of the potential commercial impact of a patent. Patent examination does not determine the relevant market in which the invention may be marketed or sold. No patent examiner projects the economies of scale to be achieved through the invention. Patent examiners, in considering the breadth of claims, are guided by the principle that a patentee's rights are limited only by the ability to make a fully enabling disclosure of the invention, to provide an adequate written description of the invention, to demonstrate the utility of the invention, and to show the invention is novel and non-obvious in view of what we call the "prior art."

An innovator in a new area of technology may gain what is called a "pioneer patent" that provides broad rights. There is nothing new, nor should there be anything unsettling, about this. The history of patents, and that of America, is replete with examples of inventions that broke new ground. From the telephone to the Internet, from automobiles to plastics, the issuance of patents has not impeded the development of new technologies and resulting industries, despite initial protests that issuance of a patent would decimate innovation and competition.

Although patent law and competition law are not universally congruent, they are highly compatible and serve many similar ends.

To the extent that the Patent Act and antitrust laws are based on dissimilar policies, competition regulators are rightfully cautious in assuming that Congress automatically intends the distinctive policies of antitrust laws to trump those underlying the intellectual property system. This is especially so when one contemplates that the foundations for intellectual property protections are found directly in the United States Constitution. These hearings rightfully reflect that caution, as well as the FTC and Justice Department's recognition of the growing importance of intellectual property rights in the U.S. economy.

Over the last two decades, our three agencies have helped work within the framework of the patent system to facilitate innovation and productivity in the American economy. For instance, licensing guidelines that the FTC and DOJ promulgated in the 1980s helped articulate a balanced view of the value of patent rights. That development allowed creative and inventive enterprises to increasingly see patents not merely as tools for protecting their product market, but as valuable assets that serve broader economic purposes. Based on the value of these assets, a proliferation of start-up firms in the last decade received financing even before they had products to sell.

Today, established firms, and in particular universities, now have increasing incentives to look for others who can use their patented technologies in order to maximize return on their intellectual property. In contrast, a return by competition regulators to viewing IP rights with a 1970s-era suspicion would risk interfering with these market-based incentives to innovate.

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Several independent developments in the last twenty years also have affected patent policy. One was the establishment of the Court of Appeals for the Federal Circuit. The existence of a court of national jurisdiction for cases involving patents has been an invaluable tool. By reducing the jurisdictional conflicts that had preceded the court's formation, the Federal Circuit has made for a more stable patent system.

The USPTO now has a more coherent body of law against which to judge applications for patents, and inventors have a more assured basis for making judgments on filings.

Patent litigators have a greater ability to anticipate the issues that will be raised in cases concerning whether patents are valid and infringed. This stability has helped contribute to enhancing the value of patent rights as an engine of progress.

Another development has been the expansion of the subject matter of patents. Whenever new technologies are presented for patenting, such as with microorganisms or computer software, the entry of patent law into these areas was greeted with predictions of disaster. Yet today the United States is the international leader in these and all other technological areas.

Further, the United States has made it a key part of its trade policy to create international frameworks for recognizing intellectual property rights. Agreements negotiated through WIPO and the WTO have enhanced the ability of American inventors and holders of intellectual property rights to obtain and enforce parallel rights abroad.

In short, over the past two decades the value of patents as business portfolio assets has increased, their validity has become more predictable, and the areas in which patents could be obtained have expanded. Each of these developments enhances the usefulness of patent law as a motivator for innovation. This is reflected in today's unprecedented explosion of patent applications.

There are some who regard the increase in patent filings with suspicion. The USPTO regards this growth with mixed emotions. For a number of years, the USPTO has been engaged in what sometimes seems an epic struggle to muster sufficient resources to provide the timely and quality service our customers need. But we remain confident that the growth in patent applications is a boon for America's economy, as well as contributing to our genius for innovation.

Looking across the world we see a high correlation between a country's economic strength and the vitality of its patent system. No single cause explains economic growth, but neither is it an accident nor coincidence that the United States stands at the top of both lists.

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Once again, I thank Chairman Muris for his gracious invitation to participate here today. In accepting the invitation, I committed our agency to helping these hearings facilitate a full discussion on the issues surrounding the interplay of intellectual property and antitrust policy. We look forward to assisting both the Commission and the Department of Justice in gathering whatever information they need to make sound policy decisions in today's knowledge-based economy.